IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT KIGOMA

LAND APPEAL NO 1 OF 2020

(Arising from the Decision of District Land and Housing Tribunal for Kigoma at Kigoma in Land Application No. 90 of 2014)

FATUMA IDDI AND 29 OTHERS .....APPELLANTS

VERSUS

M/S LUSUNGU HIGH SCHOOL.....RESPONDENT

J U D G E M E N T

Dated: 26/05/2020 & 27/05/2020

A. MATUMA, J.

In the District Land and Housing Tribunal for Kigoma at Kigoma, the Respondent successfully sued the appellants who are thirty in total over a dispute of Land Located at Plot no. 509 PB Buronge in Kigoma Region, the plot comprises a total of 71 plots allegedly to have been originally owned by some of the appellants together with some others not subject to this appeal but later been granted to the Respondent for the purposes of establishing a High School. It was further alleged that the appellants and the Respondent had agreed for some compensation but in the due course the appellants refused to honour the agreement. The respondent thus sued them for a declaration that she is the lawful owner of the dispute plot and the appellants be ordered to honour the agreement. The appellants in the instant matter are; Fatuma Idd, Shukuru Iddi, Moshi Iddi, Jumanne Iddi, Kangaru Iddi, Sophia Iddi, Sauda Iddi, Amisa Iddi, Salma Mohamed Ramadhani, Maneno

Malowe, Dastan Reuben Petro, Mnyonge Zuberi Nduvungane, Ignad Samwel Hinga, Abubakar Hamis, Albert Festo Ntezikiba, Aniset Lucas Ludonongo, Honorata Richard Yalimo, Justina Vicent Bukuru, Getruda Daudi Lusambi, Kassim Ramadhani Mashaka, Noboka Hamis Noboka, Slyvanus Simon Hindi, Amadeo Mlelwa, Veronica Ibrahim, Mbogo Kassim Rajabu, Hamimu Salum Mohamed, Zuberi Sadick, Almas Chakupewa, Alex Lusendela and Sadick Yahaya who stands as 1st to 30th Appellants respectively.

The trial tribunal after a full trial adjudged for the respondent and declared all Appellants as trespassers to the suit land, the 1st to the 9th Appellants be paid compensation, the appellants to pay the respondent Tshs. 20,000,000/= as compensation for the allegedly destruction of school structures and building materials, the appellants were further condemned Tshs. 5,000,000/= as punitive damages, general damages at Tshs. 10,000,000/= and costs of the suit. The appellants were aggrieved with the said decision hence this appeal with several grounds but for the purposes of this appeal only two grounds suffices to dispose off the entire appeal. These are;

1. *That the trial tribunal grossly erred in law and fact when it entertained the case as it was instituted by the Respondent against the appellants while the said tribunal was improperly instituted contrary to section 23 (1) and (2) of the Land Disputes Courts Act, Cap. 216.*
2. *That the trial tribunal grossly erred in law and fact when entertained and determined the suit land while the necessary part to wit Kigoma Ujiji Municipality is not joined as a necessary party-defendant. Hence vitiate the entire proceedings and judgment.*

The learned advocate for the appellants Mr. Silvester Damas Sogomba submitted on the first ground herein above that in terms of section 23(1) and (2) of the Land Disputes Courts Act, the District Land and Housing Tribunal must be composed in the aid of not less than two assessors. He argued that in the instant case the respondent's witnesses who gave evidence on the 9th and 10th days of October,2019 gave it in the absence of assessors. He contended further that the assessors were only invited in the appellants' case the then respondent. The learned advocated winded up this ground by submitting that the assessors thus gave opinion on the case they never heard and that vitiated the entire proceedings for being a nullity. To fortify his argument he cited to me the case of ***Ameir Mbaraka and Another vs. Edgar Kahwil, Civil Appeal no. 154 of 2015*** in which the court of Appeal of Tanzania declared the proceedings of the trial tribunal a nullity for none-composition of the assessors in the trial.

Mr. Kagashe learned advocate on his party, did not have objection on this ground. He conceded it stating that the trial tribunal was not properly constituted hence the whole trial a nullity. He asked this court to nullify the entire proceedings and leave an option to the parties to re-institute the case if they will so desire.

I will start to address that I entirely agree with both learned advocates that the records of the trial tribunal clearly indicate that the evidence of the respondent's witnesses were taken in the absence of assessors. Thus for example on the 09th and 10th days of October, 2019 when the evidence of PW1 Anold Nicholous Mtewele, PW2 Halima Mbaga, and PW3 Justine Gidion were taken there was no assessors in attendance. The assessors Aziza and

Magreth only sat with the trial Chairperson when the evidence of DW1Fatuma Idd and DW2 Mbano Maulid for the Respondents were taken. Thus the evidence of the Applicant/Plaintiff now the Respondent was all received in the absence of any assessor as rightly submitted by Mr. Silvester Damas Sogomba learned advocated and as rightly conceded by Mr. Ignatius Kagashe learned advocate for the Respondent.

Under section 23 (1) and (2) of the Land Disputes Courts Act, Cap. 216 R.E. 2002 as amended it is provided that the composition of the District Land and Housing Tribunal shall be of one Chairman and not less than two assessors who shall at the end of the trial give out their opinion before a judgment is reached. If the records do not show that assessors were involved in the trial, the proceedings would normally be a nullity. See the case of Ameir Mbaraka supra.

Despite of the fact that assessors did not hear the respondent's witnesses, the trial Chairperson purports to show that they opined as reflected at page 3 of the judgment of the trial tribunal that;

"So in liue of the above findings, I concur with the opinion of one assessor mama Heguye who opined for the Applicant and differ with the opinion of the other assessor mama Kasongo who opined for the respondent and declare the applicant as the lawful owner of the dispute premise".

The judgment of the trial tribunal is thus trying to reflect that one of the assessors opined for the applicant and the other opined for the respondents. Even though the said judgment was drawn on 18/12/2019 and delivered on 30/12/2019 while the proceedings ended way back on the 21/10/2019. The proceedings do not reflect what exactly the assessors opined before she

could reach to her decision. Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations of 2003 gives a mandatory requirement to the trial chairman to take the opinion of assessors in writing. Therefore the purported opinion as per judgment is not even supported by the proceedings. It is like the trial chairperson informally took the alleged opinion in the absence of the parties and out of court record. That is wrong. The opinion of assessors must clearly be taken in writing and be reflected on record. The opinion of assessors is not the chairman's personal facts to be consumed and kept into her or his head to the exclusion of all others. How could he or she remember exactly the opinion of each assessor at the time of composing the judgment especially when there are many judgments to be written and when they are to be written at a future time from the date of final hearing like what happened in the instant matter. Failure of the records to reflect what exactly the assessors opined, leaves doubts on the purported opinion as per judgment because it is easy for the trial chairman to mistake the opinion of one case into the opinion of another case. To do away with the doubts, the chairmen should abide with the law that requires them to take the opinion in writing and in the presence of the parties in a dully constituted tribunal.

Even though, section 24 of the Land Disputes Courts Act supra mandates the trial chairman to obtain and consider the opinion of assessors before reaching to his decision. The assessors who are to give their opinion are only those who were in attendance of the trial throughout. A stranger assessor is not legally capable to opine. In the case of Ameir Mbaraka supra the court of Appeal at page 6 held that the provisions of section 23 (2) of the Land Disputes Courts Act is to the effect that the assessors who has to opine;

"must be among the assessors who must be in attendance throughout the trial so as to enable the assessors to make an informed and rational opinion".

In the circumstances, assessors who were not fully involved can not give an effective opinion. In this case the purported opinion of assessors cannot be said to be effective for they did not hear the evidence of one side in the case.

In the case of **Edina Adam Kibona v. Absolom Swebe (Sholi), Civil appeal No. 286/2017** the Court of Appeal observed that the assessors at the trial tribunal were not fully involved. It thus remarked in the first page;

> *"At the hearing of the present appeal, Mr. Justinian Mushokororwa, the learned counsel who appeared for he appellant, after a dialogue which took some considerable time, conceded to the concern raised by the court on its own motion on the propriety or otherwise of* ***the assessors not being fully involved at the trial in the District Land and Housing Tribunal."***

The court in that regard therefore remarked that there could not be effective opinion from the assessors who did not hear the case. Furthermore, as herein above reflected in the judgment of the trial tribunal, those who purportedly opined as assessors are **mama Heguye** and **mama Kasongo.** It is not clear on record however, whether those mama Heguye and mama Kasongo are the same as Aziza and Magreth who sat as assessors during the defence case. I thus I find out that the assessors in this case were not fully involved on the trial of this case.

In the final analysis I am of the view that the trial by the trial tribunal was a nullity on the herein above ground and the same cannot left to stand. I subsequently declare the proceedings of the trial court a nullity and set aside the judgment and decree reached thereof.

Up to this juncture I would have ordered a retrial but Mr. Kagashe learned advocate was of the view that the parties be left at liberty to commence the suit afresh. I agree with him not only on that ground but also on the strength of the second ground of appeal that a necessary party was not involved in the trial of this matter. While Mr. Silvester Damas Sogomba learned advocate contended that Kigoma Ujiji Municipal Council was a necessary party because she is the one who reallocated the dispute land to the respondent from the appellants without prior consultation and adequate compensation, Mr. Ignatius Kagashe was of the view that Kigoma Ujiji Municipal Council was not a necessary party because the parties had their private agreement on compensation but later on the appellants rescinded the contract and the respondent went to court just to have them forced to honour the agreement.

Having gone through the records and even the submissions of the parties before me, it is quite clear that there is no dispute between the parties that the Respondent was allocated the land in dispute which was originally owned by some of the Appellants and who in turn had sold some pieces to other appellants herein. There is also no dispute that the re-allocation was done prior to the alleged agreement for compensation. I thus find out that the allocating land authority was a necessary party in the instant matter who could explain the justification of her re-allocation.

In the circumstances, a retrial won't serve the purpose as the necessary party was not involved. I thus direct the Respondent that if she is eager to continue contesting for her interest in the dispute land, she must commence the suit afresh in the trial tribunal against not only the appellants but also against the alleged land authority which re-allocated her the dispute plot as a necessary party. Any suit to be commenced shall be subject to relevant requirements of the laws governing land disputes and litigations such as time limitation, requirement of statutory notice to sue etc.

Until otherwise determined by the Court of competent jurisdiction, the right of the parties hall remain as if there has not been any suit between them.

The parties contested for costs of this appeal. Mr. Silvester Damas Sogomba learned advocate pressed for costs against the respondent on the ground that the defects herein have been raised by the appellants and the respondent ought to have sued along with the appellants, the Land Authority Kigoma/Ujiji Municipal Council. Mr. Ignatius Kagashe learned advocate on his party argued that each party should bear its own costs because the faults herein were solely committed by the trial tribunal.

I think I should agree with Mr. Kagashe that each party bears its own costs because if someone is to be blamed then it is both parties along with the trial tribunal. Both parties, because they were dully represented by learned advocates and each abrogated its statutory duty as an officer of the court, to remind it to properly constitute itself. Also on the second ground I have not seen an explicit objection at the trial for the none-joinder of a necessary party which would have been contested thereat and perhaps entitle costs to the appellants had the respondent forcefully maintained that her suit could

proceed without necessarily joining that other party. I thus don't see any justification in condemning costs to either party against the other. This appeal is therefore allowed without costs on the afore grounds. Whoever feels aggrieved is hereby informed of his right to further appeal to the Court of Appeal of Tanzania subject to the relevant governing laws.

It is so ordered.

A. MATUMA,

JUDGE

27/05/2020